

Tuesday, 26 November 1946

- - -

INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Chambers of the Tribunal
War Ministry Building
Tokyo, Japan

PROCEEDINGS IN CHAMBERS

On

Paper No. 564 - Application of the Prosecution for leave to present the evidence in chief of Major K. A. deWeerd, a witness on behalf of the Prosecution in the form of a prepared statement instead of by oral examination.

Paper No. 573 - Application of the Prosecution for leave to present affidavit evidence by reading prepared synopses thereof and producing the originals as exhibits.

Request by the defense as to procedure for production of witness HIRATA.

Before:

HON. SIR WILLIAM WEBB,
President of the Tribunal and
Member from the Commonwealth
of Australia.

Reported by:

Sam Goldberg
Court Reporter, INTFE

Appearances:

FOR THE PROSECUTION SECTION:

A. J. MANSFIELD, Justice, Associate
Counsel, acting on behalf of the
Commonwealth of Australia.

MR. SOLIS HORWITZ

MR. G. OSMOND HYDE

MR. A. T. LAVERGE

FOR THE DEFENSE SECTION:

MR. WILLIAM LOGAN, JR., Counsel for the
Accused KIDO, Koichi

MR. OWEN CUNNINGHAM, Counsel for the
Accused OSHIMA, Hiroshi

MR. GEORGE F. BLEWETT, Counsel for the
Accused TOJO, Hideki

FOR THE OFFICE OF THE GENERAL SECRETARY,
INTFE:

MR. CHARLES, A. MANTZ, Clerk of the Court

MR. H. W. DELANEY, Deputy Clerk of the Court

The proceeding was begun at 0900

- - -

THE PRESIDENT: This is an application for leave by the prosecution to present affidavit evidence by producing the original documents and reading a prepared synopsis. Who pleads for the applicant?

MR. JUSTICE MANSFIELD: I plead for the application.

THE PRESIDENT: Who is for the prosecution?

MR. JUSTICE MANSFIELD: I am for prosecution.

THE PRESIDENT: For the defense?

MR. LOGAN: I am for defense.

THE PRESIDENT: Mr. Logan.

MR. LOGAN: Mr. Cunningham and Mr. Blewett.

THE PRESIDENT: Is there any opposition?

MR. LOGAN: Yes, your Honor. I believe this motion is in substance the same motion that was made some time ago for leave to take excerpts from six hundred and fifty affidavits, and which was subsequently withdrawn.

MR. JUSTICE MANSFIELD: That is not correct. That is not the same.

MR. LOGAN: It involves the same affidavits, doesn't it?

MR. JUSTICE MANSFIELD: It involves some of

the same affidavits.

MR. LOGAN: In the first place, we have not seen any of these affidavits, and they have all been taken ex parte without the opportunity of the defense to be present and some, I imagine, were taken some years ago. The prosecution now wants to take excerpts from those affidavits and make a synopsis of the excerpts. It is quite apparent that, from this method of procedure, that the Court will not get a proper picture of what is contained in those affidavits because, as we all know, excerpts do not reveal the proper import of the complete affidavit; and where the prosecution is now endeavoring to make a synopsis of excerpts, the true picture of the entire affidavit will be further distorted. We have seen, even during this trial, where prosecution, prior to introduction of documents, has made preliminary statements, and on numerous occasions we have checked them and found that the documents do not support the preliminary statement made by the prosecution. In other words, your Honor, what the prosecution is attempting to do here is to give a summation of what is contained in documents in the middle of a trial, which we contend to be entirely out of order. The affidavits themselves will probably contain conclusions which, if the prosecution uses them, should not be considered by the

Court at all. Furthermore, with respect to the witnesses themselves, the defense does not know who these witnesses are. They are unheard of, unknown to us, and, in some cases perhaps, they have testified in previous trials; and if that is so, we should be given the opportunity of knowing what trials they have testified in so that we can get the complete transcript of those trials. In addition to that, the prosecution has requested that the rule be relaxed so that it would not be necessary to supply Japanese counsel with a full Japanese copy of these affidavits. The Japanese counsel--

MR. JUSTICE MANSFIELD: That is not correct. We are only required to give Japanese translations of extracts relied upon in the translation. Read rule 6-b(1).

MR. LOGAN: That is if you are required to read excerpts. If you are permitted to use excerpts, then the Japanese counsel would like to have Japanese copies of the entire affidavit so that they could study them. In other words, your Honor, we feel that we are fighting in the dark here. I understand from Mr. Justice Mansfield that there is going to be about four hundred of these affidavits. It is almost impossible to defend a case where four hundred affidavits are practically dumped in our laps. We have no

opportunity to fight a thing like that.

THE PRESIDENT: Is this all Australian material or does it include some of the English?

MR. JUSTICE MANSFIELD: English, Dutch, American and Australian.

THE PRESIDENT: You say it will shorten the time by seventy-five per cent?

MR. JUSTICE MANSFIELD: The time of reading the affidavits, yes. I might first of all point out that it is not necessary under the rule (-b(1) as it at present stands, where only portion of a document is being relied upon by the prosecution, to translate into Japanese and have copied into Japanese the whole of the document. It is only the Japanese -- Japanese is only required to be used for that part of the document which is relied upon. The whole document, of course, will be copied in English and will be served upon the defense in the ordinary way. As a matter of fact, it may be that there is no necessity to make this application because there is no requirement on the prosecution to read the whole of any document. The only reason why this application was made is because the Bench stated on one occasion early in the trial that if a document was not read, that apparently it was not important and was not relied upon. In order to get over that

particular statement, this application has been made. It would be quite permissible for us, I submit, to produce all these affidavits without reading one of them and just to make an introductory remark in respect of each document. That has been done in the past in relation to documents, and I submit that it could be done in the future. However, so that the Bench will not think that the prosecution considers the document unimportant, this application is made.

THE PRESIDENT: I would repeat, Mr. Justice Mansfield, that if you do not read a document, you do not regard it as of importance unless at the time you present the document you gave a reason for not reading it which is not inconsistent with its importance. That is what it is.

MR. JUSTICE MANSFIELD: Yes. Well, the object of this application is to, of course, save time. Now I submit that if a synopsis is not used, the documents will be served on the defense -- full documents in English, the excerpts in Japanese. The prosecution will only read the excerpts in English; and if that is objected to by the defense, then they can require other portions of the document to be read -- if they say it is not a fair extract. That is in accordance with the rules as they now stand.

It has also been suggested that they do not know who the deponents are, whether they have testified before and so on; and it is also suggested that we can only use excerpts when we obtain an order of the Court. Now I submit that has nothing whatever to do with this application because we are entitled under the rules and under the Charter to use affidavits without informing the defense who they are, whether they have testified before or anything about the witnesses. That is no obligation on us to do that. This application, if it is refused, will not put them in any better position with regard to that particular aspect. But, I submit, if the Court pleases, that the position is that if we are required to read the excerpts from these affidavits, that it will take, I should say, possibly, at least a fortnight in reading affidavit evidence. If, on the other hand, a synopsis is prepared and is served on the defense before it is used, then it will probably only take three to four days to read the affidavit evidence. They get the affidavits too.

MR. LOGAN: If the Tribunal please, may I answer Mr. Justice Mansfield? This is not an application, as I read it, for leave to serve -- to read excerpts. Of course we recognize the prosecution has a right to read any portion of a document they

desire: but this is an application to make a synopsis of excerpts, which is entirely different than reading an excerpt to the Court.

THE PRESIDENT: This is a digest of the affidavit.

MR. LOGAN: It is a summation, that is all it is, Judge.

THE PRESIDENT: Perhaps the difference is in words only, Mr. Logan, and in substance there might be no difference. I suppose they adhere to the words of the affidavit as far as possible.

MR. JUSTICE MANSFIELD: Yes, naturally we will endeavor to be as fair as we possibly can and put in a proper representation of what is said out of, let us say, a group of affidavits.

THE PRESIDENT: I had once upon a time to digest affidavit evidence for the purpose of a report on these Japanese alleged atrocities, and I know that I was able to get the whole of the affidavit in almost without altering a word in about the fifth of the space. That appears in my report, as you know.

MR. JUSTICE MANSFIELD: That is right.

THE PRESIDENT: And the thing was checked and rechecked and nobody could add or take from a word of the synopsis. I don't see why that could not be done here. It can. However, I do not think I

ought to decide this. I may be prejudiced because I have myself prepared statements of the kind which the prosecution want to use now from affidavits; so I will refer this to the other Judges.

MR. LOGAN: But I do think, your Honor, that this motion -- if this motion is granted and the prosecution comes into Court with a synopsis, a summary, that the Japanese counsel should have the entire translation of the entire document. That is a different situation than where they are just putting in excerpts.

MR. JUSTICE MANSFIELD: They will have the complete translation of the synopsis.

MR. LOGAN: No. I am speaking of the affidavits, the translation.

MR. JUSTICE MANSFIELD: If that is the position, the whole of our work will have to be done over again.

THE PRESIDENT: Say what you have to say because I am placing the whole lot before my colleagues without saying anything except about my own experience.

MR. JUSTICE MANSFIELD: The whole thing about it is if a translation of the whole document into Japanese is required, that will mean that the whole of the translation will have to be done over again. All the work has been prepared, and this

application is made purely for the purpose of saving time. I mean the prosecution does not get any benefit out of it. It is purely for the purpose of saving time; and if the defense does not want to see time saved, then, of course, that is another matter. We are quite prepared to go ahead and read the excerpt in accordance with the rule but that, as I say, will take some considerable time; and it is for the purpose of saving the time that this application is being made. If we are required to give complete translations into Japanese of the whole document, the whole affidavit, then the whole of the work will have to be done over again because we have complied with the rule in the preparation of these affidavits, and we have translated the excerpts into Japanese in accordance with the rule. Each of the American counsel will get a complete copy of the affidavit in English with the excerpts marked on it so that they will know which particular parts we are using and which particular parts we consider are immaterial.

THE PRESIDENT: In a synopsis you can place in logical order, too. They do not always appear in the affidavit unless the affidavit is most carefully drawn.

MR. JUSTICE MANSFIELD: That is so, yes; and in this particular case a number of the affidavits or

depositions were not prepared in the sense that they were written down for the person after having been interrogated. They were taken straight from the person as he gave his evidence.

MR. LOGAN: May I point out, your Honor, that I do not think the fact that the translation may have to be done over again is any reason why it should not have been done in the first place, or why it should not be done at this time; and, furthermore, with respect to the question of saving time, the defense, too, are interested in saving time. But, where we believe that by saving time the rights of these accused are prejudiced, we are opposed to it.

MR. JUSTICE MANSFIELD: Now if they can show us that we have not complied with the rule as it now stands -- under the rule, I repeat, and I repeat it for the benefit of Mr. Logan, who apparently has not read the rule --

MR. LOGAN: Now I have read the rule. I have been in here many, many times.

MR. JUSTICE MANSFIELD: Will you read it again? When excerpts are used from a document, it is only the excerpts which are translated into Japanese.

MR. LOGAN: That is not this application, your Honor. This is an application for a synopsis, not to

use excerpts. Mr. Justice Mansfield probably does not understand the application he is making here.

MR. JUSTICE MANSFIELD: Well, it is obvious Mr. Logan does not because we have these documents from which we take excerpts. We are quite prepared to read the whole document if Mr. Logan wants to waste that time.

THE PRESIDENT: The Court would not allow that if it could help it.

MR. JUSTICE MANSFIELD: Exactly. We are saving time by having these excerpts marked and only reading portions of the document.

THE PRESIDENT: You are not reading any affidavits that were taken before me, any evidence taken before me?

MR. JUSTICE MANSFIELD: No, we are not reading any affidavits taken before you.

MR. BLEWETT: If your Honor please, I agree very strongly with Mr. Logan that the defense is really very much interested in saving time because it would seem to me from my study of this case that this is one of the most important phases in so far as these individual accused are concerned. I think we should be permitted as much latitude as we think necessary in so far as these documents are concerned. Surely a prepared synopsis of an affidavit might not

reveal its true intent or content. That very well might be very serious in so far as any one of these accused is concerned.

MR. JUSTICE MANSFIELD: They get the whole affidavit. They get Japanese translations of the excerpts, and if they suggest that any synopsis is not fair or not properly put before the Court, then they can bring that before the Court.

MR. BLEWETT: Well, if your Honor please, our work is pretty heavy. We have quite a burden. Now we will be impelled to take these synopses and check them all with the affidavits. That is an additional item of work. The affidavit itself, we read that. We know what to expect. We know the type of witness and we know how to combat that, if there is anything to combat, but now if we have a synopsis, that is the work of the prosecution. That is not the affidavit.

MR. LOGAN: It is practically a summary, if your Honor please, right in the middle of the case. That is all it amounts to.

MR. JUSTICE MANSFIELD: What we can do then, if there is any objection, we can do what is done already: get some narrator witness to go into the box, prepare his own summary, and say according to certain documents certain things happened. Here are

the documents that show it.

MR. LOGAN: We have been opposed to that right along, too.

MR. JUSTICE MANSFIELD: It is a question for the Court as to whether they allow it or not. We know you oppose everything practically except application under Rule 6(b) (1).

MR. BLIWETT: We really feel very seriously about this, your Honor, because we think it is quite important. That is our purpose in resisting it.

THE PRESIDENT: I express no opinion one way or other in view of my association with these matters during the War. As you say, there was nobody to represent the Japanese then.

MR. CUNNINGHAM: Your Honor, may I make one observation? I have some serious objections to specific affidavits for particular reasons. It is almost impossible to object to the substance of an affidavit when it is incorporated into a synopsis of an excerpt from that affidavit, and either the affidavit should go into evidence in toto, not synopsisized, but only in its original form so that objection can be made to the evidence in substance as it appears into the record and not objection to someone's interpretation or selectivity.

MR. JUSTICE MANSFIELD: The affidavit is

going to be put in evidence.

MR. CUMINGHAM: That is right, but objections can hardly be made to specific information when they are covered up into a synopsis.

MR. JUSTICE HANSFIELD: The excerpts are marked on the English copy. The English copy is given to you and Japanese translation of the excerpts is given to you also.

MR. CUNNINGHAM: But you are relying upon the synopsis and you are relying upon the interpretation. You are relying on selectivity. You are relying on certain features of certain pieces of evidence. You are not relying on a totally original document. We have to search beyond and beyond and beyond in order to object to the thing which is objectionable.

THE PRESIDENT: Well, I think you have both put your views forth, both sides have put their views fully. I will consider the matter.

MR. HORWITZ: Mr. President, I have asked this morning that paper No. 564, the application to use Major deWeerd's evidence in form come up again at this time.

THE PRESIDENT: Yes. Well, I understand from you that you have made a statement from the original report which has reduced it from one hundred and

thirty-nine pages to about fifty.

MR. HORWITZ: Fifty-six pages, to be exact, your Honor.

THE PRESIDENT: Well, have you confined it now to statement of fact?

MR. HORWITZ: Everything that could be a conclusion, either directly a conclusion or indirectly by use of adjectives, have been taken out of here; and this is nothing more nor less than a statement of fact, and some of the detail has been summarized to bring it within the scope of the instructions of your Honor last Friday.

THE PRESIDENT: What have the defense to say?

MR. LOGAN: We have not seen the statement as it has been cut down, your Honor.

MR. HORWITZ: The statement is being redone now.

THE PRESIDENT: Let Mr. Logan see it before I come to a conclusion.

MR. HORWITZ: Your Honor, there is one other thing; that is, after being shunned, we wish the original statement returned.

THE PRESIDENT: I thought it should be, all the originals should be returned to you. I take it there will be no question about it.

MR. HORWITZ: Your Honor, this thing is coming rapidly to the time when we are going to present it.

THE PRESIDENT: I appreciate it.

MR. HORWITZ: We would like to know what is going to be done with it.

MR. LOGAN: I will look it over tonight.

THE PRESIDENT: Mr. Logan will look it over tonight. I will decide it in the morning.

MR. BLEWETT: May I raise one question, your Honor? One of my witnesses, Mr. HIRATA, has been sentenced to be hung in Singapore. I don't know whether the execution has taken place or not yet, but I talked with Judge Dell and Mr. Mantz and Colonel Hanley and they are endeavoring to find out; but I thought it proper I should bring the matter up.

THE PRESIDENT: I am sure the British authorities would not want to hang him if he is really a necessary witness in this trial.

MR. BLEWETT: That is the reason I brought the matter up.

THE PRESIDENT: I will express the opinion they should not if he is a necessary witness. You can make whatever use of it you want to or can.

MR. BLEWETT: I was going to talk about the proper procedure to get a stay.

THE PRESIDENT: There will be no need for me to state the view they should not hang him if he is a necessary witness here. I am quite satisfied they will act that way without any suggestion from me.

MR. HORWITZ: Your Honor, on application 564 I want to make one statement clear now so this question does not need to come up again. This Major deWeerd's statement is not being offered primarily in connection with violation of class "B" and "C" offenses. It is being offered in connection with aggressive warfare, to establish aggression and the meaning of aggression; and that is the primary purpose of this statement.

THE PRESIDENT: Yes. That is the end of business for today.

(Whereupon, at 0923, the proceeding was concluded.)